NG KAM WEI

v.

PP

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: K-05-339-2009]
2 JULY 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Prosecution's case based on direct trafficking - Whether custody and control must be established - Whether appellant raised reasonable doubt on prosecution's case*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking in dangerous drugs - Prosecution's case based on direct trafficking - Whether appellant had knowledge, custody and control of box containing drugs - Whether trial judge properly evaluated and appreciated defence - Whether appellant raised reasonable doubt on prosecution's case*

EVIDENCE: *Adverse inference - Failure of prosecution to call witness - Whether material witness - Whether witness offered to defence - Evidence Act 1950, s. 114(g)*

EVIDENCE: *Agent provocateur - Corroboration - Whether evidence must be corroborated - Whether credible witness - Whether consistent in testimony - Whether agent provocateur's evidence admissible*

Following information received from an informer, PW6 and Det L/Cpl Azib ('Det Azib') were instructed by their superior, ASP Rosli, to be agent provocateurs and posed as drug purchasers. Subsequently, they met the appellant with the assistance of the informer and negotiated the sale of cannabis. Thereafter, PW6 informed ASP Rosli about the negotiation. ASP Rosli subsequently instructed his police party, including PW6, PW4 and PW5 to lay an ambush and to arrest the suspect at the Petronas petrol station. The appellant was then arrested. The appellant did not run away but was startled when he was arrested. A box containing ten compressed slabs of dried substance, which were subsequently confirmed to be 8,529.5 grams of cannabis, was

recovered from the appellant's car. The appellant was thus charged for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s. 39B(2) of the DDA. At the close of the prosecution's case, the trial judge made a finding that there was a direct trafficking of the proscribed drugs by the appellant and thus held that the prosecution had proved a *prima facie* case against the appellant and called the appellant to enter his defence. At the end of the defence case, the judge found the appellant guilty of the charge and sentenced him to death. Hence this appeal against the decision. The grounds relied on by the appellant were, *inter alia*, (i) there were doubts in PW6's evidence and his evidence was not corroborated and that adverse inference ought to be invoked against the prosecution for its failure to call Det Azib, ASP Rosli and Richard as witnesses; (ii) there was insufficient evidence to show that the appellant had the knowledge, custody or control of the box containing the drugs; (iii) it was not safe to convict the appellant based on circumstantial evidence; and (iv) the trial judge had failed to properly evaluate and appreciate the appellant's defence.

Held (dismissing appeal; affirming conviction and sentence)
Per Hasan Lah JCA delivering the judgment of the court:

(1) The law regarding agent provocateur's evidence, that his evidence is admissible in court without corroboration, is settled. PW6 was an agent provocateur and hence his evidence was admissible without corroboration. The learned trial judge had rightly accepted the evidence of PW6 with regard to the negotiation he had with the appellant and his evidence was not shaken under cross-examination by the defence. PW6 was a credible witness and there was consistency in his evidence. Further, the fact that the appellant went to deliver the proscribed drugs at the Petronas petrol station gave credence to PW6's story about the prior negotiation he had with the appellant. (paras 35 & 36)

(2) Det Azib was present when PW6 first met with the appellant but was not involved in the negotiation. He was, nevertheless, offered to the defence and hence there was no basis for the court to invoke adverse presumption against the prosecution for not calling him as its witness. Similarly, ASP Rosli was also not involved in the negotiation for the sale of the drugs and neither was he at the scene of the crime when the appellant

was arrested. He was therefore not a material witness to the case and his non-calling as a witness for the prosecution would not give rise to an adverse presumption under s. 114(g) of the Evidence Act 1950. Further, based on the evidence, Richard was also not a material witness for the prosecution. (paras 37-40)

(3) The prosecution's case was not based on custody or control or possession of the proscribed drugs. The prosecution's case was founded on trafficking by sale of the cannabis by the appellant that was provided for in s. 2 of the DDA. The prosecution had proved a *prima facie* case of direct trafficking in cannabis against the appellant *(PP v. Sa'ari Jusoh;* refd; *Tarmizi Yacob & Anor v. PP & Another Appeal;* refd). (paras 42 & 43)

(4) The prosecution's case was not founded on circumstantial evidence. Instead it was based on direct evidence of PW6, PW4 and PW5. Based on the prosecution witnesses' direct evidence, the judge made his findings of facts as the judge had the advantage of seeing and hearing the witnesses and assessing their credibility. (para 46)

(5) The defence of the appellant must be considered in the totality of the evidence adduced by the prosecution as well as in the light of well established principles as enunciated in *Mat v. PP*. The defence advanced by the appellant, tested against the totality of the evidence adduced, had failed to raise a reasonable doubt against the prosecution's case. (paras 49 & 50)

Bahasa Malaysia *Translation Of Headnotes*

Berikutan maklumat yang diterima daripada pemberi maklumat, PW6 dan Det L/Kpl Azib ('Det Azib') diarahkan oleh pegawai atasan mereka, ASP Rosli, untuk menjadi agen provokatur dan menyamar sebagai pembeli dadah. Selepas itu, mereka telah bertemu perayu dengan bantuan pemberi maklumat dan merundingkan pembelian kanabis. Kemudian, PW6 memberitahu ASP Rosli berkenaan rundingan tersebut. ASP Rosli telah mengarahkan pasukan polisnya, termasuk PW6, PW4 dan PW5 untuk menyerang hendap dan menangkap suspek di stesyen minyak Petronas. Kemudian, perayu telah ditangkap. Perayu tidak melarikan diri tetapi terkejut apabila dia ditangkap. Sebuah kotak yang mengandungi sepuluh ketulan mampat bahan kering

kemudiannya disahkan sebagai 8,529.5 gram ganja, telah dirampas dari kereta perayu. Dengan itu, perayu dituduh atas pengedaran dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s. 39B(2) ADB. Di akhir kes pendakwaan, hakim perbicaraan membuat penemuan bahawa terdapat pengedaran secara langsung dadah yang diharamkan oleh perayu dan dengan itu memutuskan bahawa pihak pendakwaan telah membuktikan satu kes *prima facie* terhadap perayu dan memanggil perayu untuk membela diri. Di akhir kes pembelaan, hakim mendapati perayu bersalah terhadap pertuduhan tersebut dan menjatuhkan hukuman mati. Oleh itu rayuan ini terhadap keputusan tersebut. Alasan-alasan yang disandarkan oleh perayu adalah, antara lain, (i) terdapat keraguan di dalam keterangan PW6 dan keterangannya tidak disokong dan bahawa inferens bertentangan wajar dibangkitkan terhadap pihak pendakwaan atas kegagalan memanggil Det Azib, ASP Rosli dan Richard sebagai saksi; (ii) tidak ada keterangan yang mencukupi untuk menunjukkan bahawa perayu mempunyai pengetahuan, milikan dan kawalan terhadap kotak yang mengandungi dadah tersebut; (iii) tidak selamat untuk menyabitkan perayu berdasarkan keterangan ikut keadaan; dan (iv) hakim perbicaraan telah gagal menilai dan menghargai sewajarnya pembelaan perayu.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

Oleh Hasah Lah HMR menyampaikan penghakiman mahkamah:

(1) Undang-undang berkaitan dengan agen provokatur, bahawa keterangannya boleh diterima di mahkamah tanpa sokongan, adalah matan. PW6 adalah agen provokatur dan dengan itu keterangannya boleh diterima tanpa sokongan. Hakim perbicaraan yang bijaksana telah dengan betul menerima keterangan PW6 berkaitan perundingan yang dibuatnya dengan perayu dan keterangannya tidak digugat semasa pemeriksaan balas oleh pembelaan. PW6 adalah saksi yang boleh dipercayai dan terdapat kekonsistenan di dalam keterangannya. Selanjutnya, fakta bahawa perayu telah menghantar dadah yang diharamkan tersebut di stesyen minyak Petronas menguatkan lagi cerita PW6 tentang rundingan yang diadakannya terlebih dahulu dengan perayu.

(2) Det Azib hadir semasa PW6 mula-mula bertemu dengan perayu tetapi tidak terlibat dalam rundingan. Dia, walau bagaimanapun, ditawarkan kepada pembelaan dan dengan itu tidak ada asas untuk mahkamah membangkitkan anggapan bertentangan terhadap pihak pendakwaan atas kegagalan memanggilnya sebagai saksi. Sama seperti itu, ASP Rosli juga tidak terlibat dalam rundingan jualan dadah tersebut dan juga tidak berada di tempat kejadian jenayah apabila perayu ditangkap. Oleh itu, dia bukanlah saksi utama kepada kes tersebut dan kegagalan memanggilnya sebagai saksi kepada pihak pendakwaan tidak akan membangkitkan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950. Selanjutnya, berdasarkan kepada keterangan, Richard juga bukanlah saksi utama kepada pihak pendakwaan.

(3) Kes pihak pendakwaan tidak berdasarkan kepada jagaan dan kawalan atau milikan dadah yang diharamkan tersebut. Kes pendakwaan adalah berasaskan kepada pengedaran melalui penjualan ganja oleh perayu seperti yang diperuntukkan di bawah s. 2 ADB. Pihak pendakwaan telah membuktikan kes *prima facie* pengedaran kanabis terhadap perayu. *(PP v. Sa'ari Jusoh;* dirujuk; *Tarmizi Yacob & Anor v. PP & Another Appeal*; dirujuk).

(4) Kes pihak pendakwaan tidak berasaskan kepada keterangan ikut keadaan, sebaliknya ia adalah berdasarkan kepada keterangan langsung PW6, PW4 dan PW5. Berdasarkan kepada keterangan langsung saksi-saksi pihak pendakwaan, hakim membuat dapatan fakta kerana hakim mempunyai kelebihan melihat dan mendengar sendiri saksi-saksi tersebut dan menilai kebolehpercayaan mereka.

(5) Pembelaan perayu mesti dipertimbangkan atas keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan dan juga bersama dengan prinsip-prinsip matan yang dikemukakan di dalam kes *Mat v. PP*. Pembelaan yang dikemukakan oleh perayu, diuji terhadap keseluruhan keterangan yang dikemukakan, gagal membangkitkan keraguan munasabah terhadap kes pihak pendakwaan.

Case(s) referred to:

Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***

Mat v. PP [1963] 1 LNS 82 HC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

A *PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC* ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
Tarmizi Yacob & Anor v. PP & Another Appeal [2010] 8 CLJ 501 FC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

B **Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)

For the appellant - M Yunus Ali; M/s Yunus Ali & Kam
For the respondent - Ahmad Bache DPP
C

[Appeal from High Court, Alor Setar; Criminal Trial No: 45-26-2006]

Reported by S Barathi

D

JUDGMENT

Hasan Lah JCA:

Introduction
E

[1] The appellant was charged for trafficking in dangerous drugs, to wit, 8,529.5 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the Act.

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[2] At the close of the prosecution's case, the learned trial judge found that a *prima facie* case was established and he called the appellant to enter his defence. At the end of the defence case, the learned trial judge found the appellant guilty of the charge and
G sentenced him to death. Aggrieved, the appellant appealed to this court against the decision.

[3] After hearing the parties, we dismissed the appellant's appeal. We now give the grounds for our decision.

H **Case For The Prosecution**

[4] On 19 December 2005 Det L/Cpl Abd Razak bin Long (PW6) received information from an informer about drugs trafficking activity involving a person by the name of 'Kenny'.
I PW6 informed his superior, ASP Rosli bin Ismail, about that. ASP Rosli then instructed PW6 and Det L/Cpl Azib bin Mahmud to become agents provocateur and posed as drugs purchasers.

[5] On the same day at about 4pm, PW6 asked his informer to arrange a meeting between him and Kenny on 20 December 2005 at Bukit Mertajam. Kenny agreed to meet PW6 on 20 December 2005 at about 8pm at Bandar Perda, Bukit Mertajam.

[6] On 20 December 2005 PW6, together with Det L/Cpl Azib and the informer, went to Bukit Mertajam at about 6pm to meet Kenny. They went in an Iswara Aeroback car bearing registration number BFX 2134. They arrived at Bandar Perda, Bukit Mertajam at about 7.45pm. They stopped at a foodstall by the roadside. PW6, Det L/Cpl Azib and the informer went into the foodstall to meet Kenny who was sitting at a table.

[7] The informer introduced PW6 to Kenny as 'Pak Long'. The three of them then sat at the same table. PW6 introduced himself as 'Pak Long' to Kenny and he also introduced Det L/Cpl Azib as his right hand man. PW6 told Kenny that he was a drug trafficker operating in Sungai Petani. According to PW6 he asked about the price of the cannabis to Kenny and Kenny told him the price was RM2,000 per kilogram. PW6 asked Kenny to reduce the price as he wanted to buy ten kilograms of cannabis. Kenny then agreed to supply ten kilograms of cannabis at a price of RM1,800 per kilogram to PW6.

[8] In the negotiation they agreed that Kenny would deliver the drugs to PW6 on 22 December 2005 between 9.30pm to 10.30pm behind the Petronas petrol station, Taman Selasih, Kulim, Kedah. PW6 would pay the money after the drugs were handed over to him. It took about 30 to 45 minutes for PW6 to negotiate with Kenny to purchase the drugs. While the negotiation was going on Det L/Cpl Azib and the informer kept quite. Kenny was subsequently identified by PW6 as the appellant.

[9] On the way back PW6 telephoned ASP Rosli bin Ismail and informed him about his negotiation with the appellant relating to the purchase of the cannabis.

[10] On 22 December 2005, ASP Rosli bin Ismail assembled his police personnel together with PW6, PW4 (Chief Inspector Ismail bin Daud), Chief Inspector Mohd Hisham bin A Rahman (PW5) and briefed them pertaining to the operation of laying an ambush and to arrest the suspect at Petronas petrol station, Taman Selasih, Kulim, Kedah.

[11] After the briefing, PW4 and his party left for Taman Selasih, Kulim and arrived there at about 5.30pm. The police party was divided into three teams. PW4 led the second team while the third team was led by PW5. The first team comprised of PW6 and Det L/Cpl Azib. The second and third teams took their positions near the Petronas petrol station, Taman Selasih, Kulim at about 8pm.

[12] PW6 and Det L/Cpl Azib took their positions behind the petrol station. They waited inside the same Iswara Aeroback car. At about 10.30pm. PW6 saw a Kia Sportage car bearing registration number PEL 7602 approaching the area behind the petrol station and then stopping in front of PW6's car. PW6 got out from his car and he saw the appellant at the driver's seat of the Kia Sportage car. There was another male passenger sitting beside the appellant.

[13] PW6 went into the appellant's car after the appellant asked him to get into his car. PW6 sat in the rear passenger's seat of the Kia Sportage car. The appellant introduced the male passenger to PW6 as 'Richard'. From there the appellant drove his car out of the petrol station's area and went to a foodstall. It took them between five to ten minutes to reach the foodstall.

[14] When they reached the foodstall they went into the foodstall to have their drink. Inside the foodstall the appellant told PW6 that the drugs were available and the appellant told PW6 that the drugs were to be delivered in a village. PW6 protested as the appellant had agreed to deliver the drugs at the petrol station.

[15] After some discussion the appellant agreed to deliver the drugs to PW6 at the petrol station. The appellant sent PW6 back to the Petronas petrol station and told PW6 that he would be coming back in about 30 minutes in a Proton Wira car to deliver the drugs.

[16] PW6 was sent back to the Petronas petrol station by the appellant at about 11.30pm. When he arrived there he went into the Iswara Aeroback car where Det L/Cpl Azib was waiting for him inside the car. PW6 then contacted PW4 through his mobile phone and told PW4 that the drugs would be delivered by the appellant between 15 to 30 minutes in a Proton Wira car.

[17] About 15 minutes later, PW6 saw a Proton Wira car bearing registration no. PFJ 6766 approaching his car and stopping in front of his car. The appellant was driving the Proton Wira car

and he was alone. PW6 walked to the driver's side of the Proton Wira car to meet the appellant who was still at the driver's seat. The appellant told PW6 to get into his car saying that the place there was not safe ("tak ada clear"); but PW6 insisted that he wanted to see the drugs first. The appellant told PW6 that the drugs were inside a box on the rear passenger's seat. When PW6 asked the appellant whether he had enough quantity of the drugs as ordered by PW6, the appellant replied that he had enough quantity of the drugs. PW6 told the appellant that he wanted to see the drugs first.

[18] PW6 then opened the rear door of the Proton Wira car. He saw a brown box on the passenger's seat. The box was closed but not sealed. He opened the box and he could smell the cannabis. He saw a few compressed slabs inside the box. After that he told the appellant that he wanted to get the money. He closed the rear door of the Proton Wira car and then he gave the pre-arranged signal to the police ambush team to act. The appellant was still at the driver's seat of the car. He did not come out of the car.

[19] The police team led by PW4, immediately acted to apprehend the appellant. PW6 ran away from the scene. PW4 arrested the appellant. According to PW4 the appellant did not try to run away but was startled. PW4 took out the brown box which was on the rear passenger's seat and opened it in front of the appellant. There were ten compressed slabs of dried substance inside the box which PW4 suspected to be ganja. Each slab was wrapped with a translucent plastic.

[20] The exhibits, together with the appellant and the Proton Wira car were then taken to Kulim Police Station at about 12.30am on 23 December 2005 and then to the Narcotics Office of IPD Kulim. A police report *vide* Kulim Report 7132/2005 was lodged by PW4. A search list was prepared and the exhibits were marked.

[21] The exhibits, the appellant and the car (exh. P43) were later handed over to the investigating officer, Chief Inspector Hasan bin Mohamed Salih (PW7). On 28 December 2005, PW7 sent the drug exhibits to the Government chemist, Puan Suriati Shaiddin (PW3) for analysis. PW3 analysed and confirmed that the ten compressed slabs were cannabis, a dangerous drug under the Act weighing 8,529.5 grammes.

A **The Defence Case**

[22] In his defence, the appellant testified that on 22 December 2005 at about 8pm he went to Taman Selasih, Kulim to meet Richard to discuss about the purchase of pirated VCDs. He went to Richard's house. According to the appellant, Richard then asked him to go with him to the Petronas petrol station to meet a friend of his. Richard told him that he wanted to discuss with his friend at the Petronas petrol station about the sale of pirated VCDs. They went there in the appellant's car.

[23] At the Petronas petrol station Richard met with his friend, a Malay man. Richard invited the Malay man to get into the appellant's car. The Malay man got into the appellant's car and sat at the rear passenger's seat. Richard also got into the appellant's car and sat beside the appellant. Richard then told the appellant to drive his car to go to a restaurant nearby for a drink. They went to the restaurant.

[24] At the restaurant, Richard introduced the Malay man to the appellant as 'Pak Long'. That was the first time the appellant met with Pak Long. While they were sitting at a table in that restaurant the appellant heard Richard tell Pak Long. "VCD yang Pak Long mahu itu sudah ada dengannya". After that the appellant did not hear their conversation as they lowered their voices to a whisper. The appellant did not talk to them while at the restaurant.

[25] About 20 minutes later, Richard asked the appellant to send Pak Long back to the Petronas petrol station. The appellant sent Pak Long back to the Petronas petrol station but he did not talk to Pak Long. Richard did not follow them but stayed back at the restaurant. After sending Pak Long back to the Petronas petrol station the appellant went back to the restaurant to meet Richard. From there they went back to Richard's house.

[26] When they reached Richard's house, Richard asked the appellant to drive Richard's car, a Proton Wira, to deliver a box to Pak Long at the Petronas petrol station. According to the appellant, Richard told him the box contained VCDs. The appellant further testified that the Proton Wira belonged to Richard. He did not check the box which was on the rear passenger's seat of the car. He drove the Proton Wira car to the Petronas petrol station alone. Richard did not follow him.

[27] When he reached the Petronas petrol station he saw Pak Long standing near the toilet. He stopped the motor car near Pak Long. The appellant said that before he could get out of the car a few people rushed towards him. A Malay man introduced himself as a police officer and ordered him to get out of the car. When he got out of the car he was handcuffed and arrested. He was taken to the IPD Kulim.

[28] The appellant said he did not know the reason for his arrest. Only at the IPD Kulim the police told him the box contained cannabis. He told the police he did not know that the box contained cannabis and the box did not belong to him. He told the police the box belonged to Richard. He also told the police that Richard was at his (Richard's) house in Taman Selasih, Kulim. He denied that he had met with PW6 on 20 December 2005. He also denied that he had a discussion with PW6 on the sale of the cannabis to PW6.

[29] Under cross-examination he said he was also known as Kenny. The Kia Sportage car belonged to him. He sold pirated VCDs. He got the supply of the pirated VCDs from Richard.

Findings Of The Trial Judge

[30] At the close of the case for the prosecution the learned trial judge found that there was an agreement made between the appellant and PW6 for the appellant to sell the proscribed drugs to PW6 at a price of RM1,800 per kilogram. The appellant was arrested when he went to deliver the drugs to PW6 at the Petronas petrol station. The learned trial judge made a finding that there was a direct trafficking of the proscribed drugs by the appellant. Accordingly, he ruled that the prosecution had proved a *prima facie* case against the appellant.

[31] With regard to the appellant's defence, the learned trial judge, after he had carefully evaluated the defence case, rejected the appellant's defence and accordingly found that the defence had not raised any reasonable doubt against the prosecution case. He, therefore, ruled that the prosecution had proved its case against the appellant beyond a reasonable doubt.

A

The Appeal

[32] Before us a number of grounds were argued by learned counsel for the appellant. Those grounds can be summarised as follows:

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(a) there were doubts in PW6's evidence and his evidence was not corroborated. Det L/Cpl Azib bin Mahmud, ASP Rosli bin Ismail and Richard were not called as witnesses for the prosecution;

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(b) the prosecution had not proved the appellant's exclusivity to the Proton Wira car or the appellant had custody or control of the brown box or knowledge of the contents of the brown box;

(c) it was not safe to convict the appellant based on circumstancial evidence; and

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(d) the learned trial Judge had failed to properly evaluate and appreciate the appellant's defence.

PW6's Evidence

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[33] The learned counsel for the appellant submitted that PW6's testimony alleging that he had met with the appellant on 20 December 2005 to discuss about the sale of the proscribed drugs was not only uncorroborated but was also vague and

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therefore could not be relied upon.

[34] PW6 was an agent provocateur. The law regarding the agent provocateur's evidence is settled. His evidence is admissible in court without corroboration (see *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17). It is to be noted that the learned trial judge had accepted the evidence of PW6 on what had transpired on 20 December 2005 when he met with the appellant to discuss about the purchase of ten kilograms of cannabis from the appellant. The learned trial judge had the advantage of hearing and seeing the

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demeanour of PW6 in the court when he gave evidence.

[35] We are satisfied that the learned trial judge had rightly accepted the evidence of PW6 with regard to the evidence on the negotiation he had with the appellant on 20 December 2005. His

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evidence was not shaken under cross-examination by learned defence counsel. PW6 was a credible witness and there was consistency in his evidence. The fact that the appellant went to

deliver the proscribed drugs on 22 December 2005 at the Petronas petrol station gives credence to PW6's story about the prior negotiation he had with the appellant.

[36] Another complaint by the appellant was on the non-calling of Det L/Cpl Azib bin Mahmud, ASP Rosli bin Ismail and Richard. It was contended that adverse presumption should be invoked against the prosecution for the non-calling of these witnesses.

[37] When PW6 first met with the appellant on 20 December 2005 to negotiate about the purchase of the cannabis from the appellant Det L/Cpl Azib was not involved in the negotiation. He was present but he just kept quiet. After the appellant had agreed to sell ten kilograms of cannabis to PW6, he informed his superior, ASP Rosli about that. On 22 December 2005 ASP Rosli rounded up his men and gave a briefing about the delivery of the cannabis at the Petronas petrol station at Taman Selasih, Kulim. He instructed his men to go to the location and make an ambush on the person who was involved in the delivery of the drugs. ASP Rosli himself did not go there.

[38] On the evidence, ASP Rosli was not involved in the negotiation of the sale of the drugs with the appellant. He was also not at the scene of the crime when the appellant was arrested. He was therefore not a material witness to the case and his non-calling as a witness for the prosecution would not, in our view, give rise to an adverse presumption under s. 114(g) of the Evidence Act 1950 against the prosecution (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221).

[39] Det L/Cpl Azib bin Mahmud was also an agent provocateur in this case. However the negotiation on 19 December 2005 was made between PW6 and the appellant. Even though Det L/Cpl Azib was present in the meeting on 19 December 2005 he did not take part in the negotiation. On 22 December 2005 when PW6 followed the appellant to a restaurant after the appellant came to the Petronas petrol station Det L/Cpl Azib did not follow them. He stayed inside the Iswara Aeroback motor car. In any event Det L/Cpl Azib bin Mahmud was offered to the defence. In the circumstance there was no basis for the court to invoke adverse presumption against the prosecution for not calling him as its witness.

[40] With regard to Richard he was not involved in the negotiation between PW6 and the appellant. He was present only on 22 December 2005, the day the drugs were delivered by the appellant to PW6. He came to the Petronas petrol station with the appellant in the appellant's motor car. He was the appellant's friend. At the restaurant he did not take part in the discussion between PW6 and the appellant. When the appellant came to deliver the drugs to PW6 he did not come along. The Proton Wira car driven by the appellant on that night did not belong to Richard. It belonged to a person by the name of Hema Naidu a/p Kannayar. The appellant did not give the particulars of Richard to PW4 or PW7 at the time he was arrested. As such, Richard was not a material witness for the prosecution. Only in his testimony that the appellant claimed that the box belonged to Richard.

Custody, Control And Knowledge

[41] The learned counsel for the appellant submitted that there was insufficient evidence to show that the appellant had the knowledge or custody or control of the box containing the drugs. The appellant did not resist the arrest; and neither did he attempt to run away. It was further submitted that the Proton Wira car in which the appellant was arrested did not belong to him.

[42] With respect, the prosecution's case was not based on custody or control, or possession of the proscribed drugs. The prosecution founded its case of trafficking on the sale of the cannabis to PW6 by the appellant. The definition of 'trafficking' in s. 2 of the Act is wide and includes the selling of a dangerous drug.

[43] Having regard to the evidence of this case in its entirety, we are of the view that the prosecution had proved a *prima facie* case of direct trafficking in cannabis against the appellant. After a negotiation with PW6 the appellant had agreed to sell ten kilograms of cannabis to PW6 at a price of RM1,800 per kilograms. When he went to deliver the cannabis to PW6 at the Petronas petrol station two days later he was arrested by PW4. On the facts of this case, a sale of the drugs had taken place notwithstanding the fact that the money for the drugs had not been paid by PW6 to the appellant (see *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197; *Tarmizi Yacob & Anor v. PP & Another Appeal* [2010] 8 CLJ 501).

[44] For the reasons given we found no merit in the appellant's contention on this issue.

Circumstancial Evidence

[45] Learned counsel for the appellant also submitted that in the instant case the prosecution had relied on circumstancial evidence as there was no other evidence tendered to show that the appellant was indeed trafficking in the dangerous drugs. It was further submitted that the circumstancial evidence relied upon by the prosecution was not strong enough to convict the appellant.

[46] We find no substance in the appellant's contention. The prosecution founded its case not on circumstantial evidence as alleged by the appellant but on direct evidence of PW6, PW4 and PW5. The learned trial judge had accepted their testimonies. The learned trial judge made his own findings of facts based on the direct evidence of the witnesses for the prosecution. The learned trial judge had the advantage of seeing and hearing those witnesses and therefore of assessing their credibility (see *Herchun Singh & Ors v. PP* [1969] 1 LNS 52).

Failure To Evaluate And Appreciate The Defence

[47] It was further submitted by learned counsel for the appellant that the learned trial judge did not give any weight to the appellant's testimony but merely believed the uncorroborated testimony of PW6. The appellant had testified on oath that he had no knowledge of the contents of the brown box. He believed Richard when Richard told him that the box contained pirated VCDs which were to be delivered to Pak Long at the Petronas petrol station. He denied that he had met with PW6 on 20 December 2005 to negotiate over the sale of cannabis to PW6.

[48] We had read the learned trial judge's grounds of judgment and we found the learned trial judge had given sufficient consideration to the appellant's defence. It is therefore incorrect to say that the learned trial judge had not judicially evaluated the defence case.

[49] The defence of the appellant must be considered in the totality of the evidence adduced by the prosecution as well as in the light of the well established principles enunciated in *Mat v. PP* [1963] 1 LNS 82 with regard to the approach to be taken in evaluating the evidence of the defence. The learned trial judge

believed the evidence of PW6 with regard to the meeting on 20 December 2005 and the meeting at the Petronas petrol station on 22 December 2005 and disbelieved the evidence of the appellant that there was no such meeting on 20 December 2005 and that the brown box belonged to Richard. On the evidence available there was no ground whatsoever on which the trial court could come to any other conclusion. There was no reason for PW6 to fabricate evidence against the appellant. In any event it was never suggested to PW6 that he wanted to frame the appellant with the offence of trafficking of the dangerous drugs. PW6 did not know the appellant before that.

[50] We had considered the defence advanced by the appellant. We agreed with the learned trial judge that the defence, when tested against the totality of the evidence adduced, had failed to raise a reasonable doubt against the prosecution's case.

Conclusion

[51] For the reasons given above we dismissed the appellant's appeal and affirmed the conviction and sentence.